UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Warren D. Boyce Z-077387356

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2252

Warren D. Boyce

This appeal has been taken in accordance with Title 46 U.S.C.239(g) and 46 CFR 5.30-1.

By order dated 12 October 1979, an Administrative Law Judge of the United States Coast Guard at New York, New York, revoked Appellant's seaman's document upon finding him guilty of misconduct. The specification found proved alleged that while serving as Able Bodied Seaman on board SS AMERICAN CHARGER under authority of the document above captioned, on or about 16 October 1978, Appellant, while said vessel was in the port of San Diego, California, wrongfully had in his possession narcotics.

The hearing was held at New York, New York on 3 January and continued through 9 August 1979.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of one witness, a deposition, and three documentary exhibits.

In defense, Appellant offered no evidence, but did submit a Memorandum of Law.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then served a written order on Appellant revoking all documents issued to Appellant.

The entire decision was served on 15 October 1979. Appeal was timely filed on 9 November 1979 and perfected on 7 February 1980.

FINDINGS OF FACT

On 16 October 1978, Appellant was serving as Able Bodied Seaman on board SS AMERICAN CHARGER and acting under authority of his document while the vessel was in the port of San Diego, California.

On the date in question, U.S. Customs Patrol Officers boarded the vessel to conduct a routine customs search. They located a small quantity of heroin and a drug paraphernalia kit in Appellant's locker. Appellant admitted ownership of these items. A field test of the substance was positive for an opium derivative. These events were memorialized in the vessel's log, which was read to Appellant as required. The Customs Officers arrested Appellant and "read him his rights." Subsequently, Appellant paid a fine for failing to manifest the importation of drugs prohibited by 21 U.S.C. 952 per 19 U.S.C. 1584.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that the Administrative Law Judge erred through: 1) unconstitutional inferences of guilt as a result of Appellant's failure to contest the logbook entry; 2) indulging the improper inference that the agent administering the field test was qualified to do so, solely on the basis of the testimony of Special Agent Roche; 3) admission into evidence of the deposition of Patrol Officer KASTAVA; 4) admission of Customs Form 151 into evidence as I.O. Exhibit 3; 5) inferring that Appellant's reference to the seized substance as "dope" equated to illegal narcotics; 6) inferring that the drug paraphernalia kit was related to the possession of narcotics; and, 7) improperly concluding

Appellant's payment of a civil fine constitutes an admission of guilt.

APPEARANCE: Rassner, Rassner & Olman of New York, N.Y. by Donald D. Olman, Esq.

OPINION

I

Appellant dwells at great length on the subject of who conducted the heroin/opiate field test, the manner in which the test was conducted, and the quality of the testing equipment. Yet it is clear from the deposition of Patrol Officers Kastava that he and another officer conducted the search and located the contraband, and that one or the other of the two subjected it to a field test. At the least Kastava was testifying from his personal observation of the seizure and test. Whether he personally performed the test does not diminish his credibility as a witness to the occurrences. His statement concerning the positive results of the test and the subsequent arrest of Appellant were also credible. Proof in these proceedings needs to be substantial evidence, not proof to a mathematical certainty. The deposition of the attending officer was not contradicted by any evidence of record. In fact all the available evidence bolsters the conclusion that the substance was an opiate. Testimony was adduced that all customs patrol officers are trained in field testing procedures. Appellant himself referred to the contraband as "dope," and admitted ownership thereof. Accompanying the tested substance was a drug paraphernalia kit. All this evidence contributed to the quantum of evidence necessary to conclude that the seized substance was an opiate.

Appellant seeks to construct a constitutional issue from the statement of the Administrative Law Judge that Appellant's response upon being apprised of the log entry was "consistent with his admission of possession to Agent Kastava." I do not credit this argument for two reasons. First, the fact of the admission to the customs officer appears on the record and stands unchallenged by even a scintilla of evidence. Second, the fact of Appellant's response and its consistency with a prior admission is a permissible area of inquiry in these remedial proceedings, as both involve statements freely given by Appellant.

II

The Investigating Officer established through the testimony of Special Agent Roche that all customs officers are trained to conduct field tests of substances suspected to be controlled narcotics. In his effort to undermine the evidence of the test results, Appellant challenges the qualifications of the tester and the circumstances of the test. However, this challenge is raised solely by argument, despite Appellant's opportunity to pose questions to the deponent officer. Mere allegations do not constitute evidence. Appellant offered no evidence to challenge the reasonable inference that the substance in question was an opiate. A permissible inference was raised by the evidence of the field test. <u>Decisions on Appeal Nos. 2065 and 1189</u>.

II

The use of depositions as evidence has long been recognized by domestic courts and is specifically sanctioned in these proceedings. 46 CFR 5.20-140. The procedure provided by regulation is consistent with constitutional notions of due process and is sufficient to protect the legitimate interests of parties charged in these civil proceedings. The Investigating Officer established the materiality and relevancy of the deponent's eyewitness account of the events on AMERICAN CHARGER on 16 October 1978. The distance involved and the relevancy of the testimony were sufficient to satisfy the good cause criteria of the regulation. The Administrative Law Judge properly admitted the deposition into evidence.

IV

Appellant objects to the admission of Investigating Officer Exhibit 3 into evidence. The completed Customs Form 151 was not entered into evidence until after the receipt of the deposition of CPO Kastava, which included a certified true copy of Investigating Officer Exhibit 3, and which identified the report as one prepared by the deponent. Although Appellant does not distinguish the issues clearly, he is in essence challenging the materiality of the evidence and its hearsay nature.

The materiality of the report cannot be doubted. As a relatively contemporaneous account of a routine customs procedure it is a valuable addition to the information presented during the proceedings. Its nature and use, as testified to by Special Agent Roche, afford it great credibility and reliability. If not subject to an evidentiary defect it should be admitted. Appellant raises the hearsay nature of the report as a bar. However, hearsay is admissible in these proceedings to which the strict rules of evidence do not apply. 48 CFR 5.20-95. Even were hearsay a bar, exceptions to the hearsay rule have grown to the extent that they are said to have swallowed the rule. One of them, the business record exception, is applicable here as a result of Special Agent Roche's testimony concerning the use of these reports by the Service. The report's character as hearsay is thus not material, and its relevancy is manifest. The Administrative Law Judge properly allowed the report into evidence.

V

Appellant contends that the equation of "dope", as the word was used by Appellant, to heroin, was an improper inference by the Administrative Law Judge. In fact this never occurred. The record demonstrates that Appellant admitted ownership of the seized substance, which he termed "dope." The evidence also was sufficient to enable the Administrative Law Judge to conclude that the substance was an opiate. In this light, the Administrative Law Judge's statement that "...[Appellant] admitted that the heroin belonged to him," does not require the indulgence of any inference from the term "dope."

Appellant was not charged with the possession of a drug paraphernalia kit. The record demonstrates that one was located with the seized contraband which tested positive as an opiate. Since the identity of the substance was adequately established in the record, no inference was required to be drawn from the presence of the drug paraphernalia kit. The Decision does not indicate that such an inference was even considered by the Administrative Law Judge. This is not to say that the fact of the kit's presence need be ignored. Any fact which sheds light on the proof or falsity of a charge may properly be considered for what it is worth.

VII

Appellant's payment of a civil penalty to the Customs Service for failure to manifest the importation of controlled narcotics was established by substantial evidence of record. The only appearance of this issue in the Decision was as a finding of fact. The evidence establishing the fact is unchallenged. It does not follow from this that some inference was drawn by the Administrative Law Judge. The charge laid against Appellant was adequately proved by the evidence of the search and seizure of the narcotics and Appellant's admission of ownership. No inference appears to have been drawn from the payment by Appellant of the customs fine, and none was necessary to the resolution of this case.

CONCLUSION

Substantial evidence on the record, of a reliable and probative character, supports the Decision and Order of the Administrative Law Judge.

ORDER

The order of the Administrative Law Judge dated at New York, New York, on 12 October 1979, is AFFIRMED.

R. H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 10th day of June 1981.